Supreme Court, U.S.
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No. 94-189

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1994

POARCH BAND OF CREEK INDIANS,
Cross-Petitioner,

v.

STATE OF ALABAMA and JAMES E. FOLSOM,
Governor, State of Alabama,
Cross-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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August, 1994

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ARGUMENT

Alabama and its Governor (Cross-Respondents and hereafter "Alabama") agree that the instant decision is in direct conflict with the opinion of the Eighth Circuit Court of Appeals in Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993) and the Ninth Circuit Court of Appeals in Spokane Tribe of Indians v. Washington State, ____ F.3d ____ 1994 WL 316443 (9th Cir. 1994). The conflict among the circuits and the several district court cases cited by the Tribe (Cross-Petitioner), which also show a pronounced split, indicate that this is a question of importance which should be decided by this Court by upholding the decision of the Eleventh Circuit on the Eleventh Amendment question.

Were this Court to address the question of Congress' power to abrogate the states' Eleventh Amendment immunity

pursuant to the Indian Commerce Clause, Art. I, § 8, cl. 3, Alabama does not accede to the arguments of the Tribe.[1] Alabama asserts that the court below properly found that Congress lacked the referenced power. In addition, Alabama takes issue with the Tribe's second and third reasons for granting the writ. The court below properly limited the holding in Pennsylvania v. Union Gas, 491 U.S. 1 (1989), to the Interstate Commerce Clause and it properly rejected the application of the exceptions set forth in Ex parte Young, 209 U.S. 123 (1908).

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[1]The Seminole Tribe of Florida also raised these issues in an original Petition for Certiorari. Seminole Tribe of Florida v. State of Florida, Docket No. 94-12.

The Tribe makes reference to the remedy set forth in Part V. of the opinion of the court below. (Cross-Petition at 6) That portion of the opinion is the subject of a Petition filed by Alabama on July 1, 1994.[2] The Ninth Circuit in Spokane addresses this remedy and creates a conflict in the circuits by denouncing it. The Ninth Circuit stated that "[the] Eleventh Circuit's solution would turn the Secretary of the Interior into a federal czar, contrary to the congressional aim of state participation." Spokane, 1994 WL 316443 at *5. Therefore, this Court needs to consider the issues raised in both

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[2]These issues are also raised in a Cross-Petition for Certiorari filed by the State of Florida. State of Florida v. Seminole Tribe of Florida, Docket Number _____.

Alabama's Petition and the Tribe's Cross-Petition as there exists a conflict in the circuits on the issue raised in each.

Rather than respond to the Tribe's arguments on the merits of this case at this juncture, Alabama intends to reserve the right to raise all substantive arguments in opposition to the Tribe's claims, if necessary, in Alabama's answer brief on the merits.

CONCLUSION

The Eleventh Amendment arguments presented by the Tribe in the Cross-Petition are faulty and were clearly rejected by the Eleventh Circuit. This Court should resolve the Eleventh Amendment conflict in the circuits by upholding the Eleventh Circuit's decision.

This Court should also resolve the conflict in the circuits on the issue of

the judicially-created remedy by vacating or by reversing Part V. of the Eleventh Circuit decision.

Respectfully submitted,

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